HAJI ISMAIL BIN CHE CHIK v. STATE COMMISSIONER, PENANG

[O.C.J. (Chang Min Tat J.) October 30, 1974]
[Penang — Originating Motion No. 8 of 1971]

Practice and Procedure — Application to declare subsidiary legislation void and of no effect — Application made by originating motion — Whether injunction can be granted against Government or Government officer — Misnomer of defendant — Government Proceedings Ordinance, 1966, s. 29 — R.S.C., 1957, O. 52 r. 1, O. 54A rr. 1 & 1A.

Administrative Law— Whether injunction can be granted against Government officer — Government Proceedings Ordinance, 1966, s. 29.

Land Laws — Statutory Land Grant — Application to declare subsidiary legislation providing for enhanced rates of quit rent void.

In this case the applicant had applied by originating motion for the following reliefs —

1. A declaration that the several subsidiary legislations specified were null and void and of no effect.
2. An order that the stautory notice of demand for the increased quit rent was also null and void.
3. A order restraining the defendant from making any revision or demand for or collecting the increased quit rent.

Conditional appearance was entered and subsequently objection was taken to the application on three grounds —

(a) The procedure adopted by way of Originating Motion for the declaration sought was wrong
(b) Prayer 3 of the Originating Motion asking for an injunction is misconceived.
(c) The respondent was wrongly designated in the Originating Motion.

Held: (1) as the Rules of the Supreme Court do not seem to have laid down any procedure for an application like the one in this case, the application should have been made by writ and not by motion;

(2) the court has no jurisdiction to entertain an application for an injunction against the Government or an officer of the Government which would have the effect of an injunction against the Government;

(3) the respondent in this case was wrongly designated but since the error was a matter of appellation, it was not of great materiality.

Cases referred to:-

(1) *Oriental Holdings Sdn. Bhd.* v. *Government of the State of Penang and Government of Malaysia* [1972] 2 M.L.J. 248
(2) *Rigdan* v. *Whitstable U.D.C.* [1958] 3 W.L.R. 205.
(3) *Sundram* v. *Chew Chee Koon* [1968] 2 M.L.J. 40.
(4) *Yap Hong Tin & Anor.* v. *Seenivasam* [1970] 1 M.L.J. 143.
(5) *Che Dah binte Haji Sulaiman & Anor.* v. *Commissioner of Land Titles, Penang* [1973] 2 M.L.J. 29.
(6) *Law Kiat Long & Ors.* v. *Pardons Boards, Johore & Ors.* [1968] 2 M.L.J. 249.
(7) *Philip Hoalim Jr. & Anor.* v. *State Commissioner, Penang* [1974] 2 M.L.J. 100.

ORIGINATING MOTION.

Lim Kean Siew for the applicant.

Abu Talib bin Othman (State Legal Adviser, Penang) for the respondent.

Chang Min Tat J.: An offer was made to the applicant to submit to judgment in the light of a decision of mine on substantially the same matter, with a right to appeal to the Federal Court, if the respondent would withdraw his objection as to the form of the action and the identity or designation of the proper defendant.

It was made after the hearing of an objection to this application which was an originating motion by a landowner who was a grantee of a statutory land grant to declare certain legislative orders providing for an enhanced rate of quit rents payable on the land held in the grant void and of no effect. They were (a) section 2(a) of the National Land Code (Penang and Malacca) Order 1965 published in L.N. 487/65, (b) the National Land Code (Periodic Revision of Rent under section 101 National Land Code 1965) published in Penang P.U. 4 of 1970, (c) the National Land Code (Standard Rate Rent) Direction 1969, published in P.U. 39 of 1969, (d) the National Land Code (Penang and Malacca) (Amendment) Order 1969 published in P.U.(A) 526 and (e) the National Land Code (Penang) (Amendment) Rules 1969, published in Penang P.U. 38/69.

I had dealt with these rules and orders, I thought, exhaustively, in *Oriental Holdings Sdn. Bhd.* v. *Government of the State of Penang and the Government of Malaysia*[1] which was similarly a case of a statutory land grant and in the absence of any new arguments or facts which would show conclusively that I was wrong in my decision, would have to come to the same decision in the present application.

The offer was however not taken up and it now behoves me to come to a decision on the objection taken.

In this application, the landowner sought the following reliefs:

1. A declaration that the several subsidiary legislations specified earlier were null and void and of no effect.
2. An order that the statutory notice of demand for the increased quit rent was also null and void.
3. An order restraining the defendant from making any revision or demand for or collecting the increased quit rent.

Following a conditional appearance, objection was taken on three grounds:

1. The procedure adopted by way of an Originating Motion for the declarations sought was wrong and should have been by way of Originating Summons.
2. Prayer 3 of the Originating Motion asking for an injunction is misconceived.
3. The respondent was wrongly designated in the Originating Motion.

It was the contention of the learned Legal Adviser on the first ground that no special procedure had been laid down for such an application and therefore the claim should have been brought by writ. In view of this submission, the first objection as framed by him is obviously a mistake, "the Originating Summons" being more correctly "a writ" or "a writ of summons."

The general position would appear to be that where the relevant statute does not provide and no special procedure is laid down in the rules, the claim for a declaration may only be sought on a writ.

Order 1 Rule 1 Rules of the Supreme Court provides that save as otherwise provided by these rules, or by any other written law, all proceedings of a civil

nature in the High Court shall be by way of action, that is, shall be brought on a writ. Order 52 Rule 1 emphasises the "save as otherwise provided" in these words:

"Where by these rules any application is authorised to be made to the court or a judge, such application if made to a judge in court shall be by motion."

The operative words are therefore "by these Rules." Order 34 Rule 1 provides for the stating of a special case by consent and does not relate to this application. Order 54A Rule 1 dealing with "a claim under a deed, will or other written instrument," does not appear to be relevant and Order 54A Rule 1A which is in these words,

1A: Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of any written law, may apply by originating summons for the determination of such question of construction and for a declaration as to the right claimed,

on a proper construction has been held not to cover the case where an applicant as in this case is seeking to declare certain subsidiary legislations null and void.

In *Rigden* v. *Whitstable U.D.C.*,[2] it was held that a person claiming that an enforcement notice under the Town and Country Planning Act 1947 section 22(1) was invalid did not come within these words.

There would appear to be no rules in our Rules of the Supreme Court covering an application in the form of a motion.

Mr. Lim, learned counsel for the applicant, however contended that regarded as an appeal from the decision of the respondent, the application would come under Order 59 Rule 13, and was correctly by motion. He cited my decision in the case of *Sundram* v. *Chew Chee Khoon*[3] but clearly what I had to decide in that case was whether, in an appeal from a decision of the Collector of Land Revenue in a foreclosure action, the appeal should be brought by an Originating Motion or by notice of motion. In this particular case there had been no decision of a person or body of persons exercising judicial or quasi-juricial functions. The respondent was merely putting into operation certain statutory provisions. The action for the declaration that these legislations were *ultra-vires* and a further order to prevent the exercise of the powers contained in such legislation, with every respect, cannot be said to be an appeal, lodged under section 418 of the National Land Code. There had been no decision made for an appeal to lie.

Our Rules do not seem to have laid down any procedure for an application such as this one, and on the authority, *inter alia*, of *Yap Hong Tin & Anor.* v. *Seenivasam*[4] which dismissed an application for recovery of possession of premises by reason of the rents falling in arrears, under section 16(1) of the Rent Control Act 1965 made by motion on a preliminary objection taken by the defendant landlord, this application should have been by writ and not by motion.

The exception would be where the statute provided for such an application without setting out any special procedure: see *Halsbury's* Laws of England (3rd Edition) Vol. 30 page 305. Compare with this passage at page 1268 of the 1963 *Annual Practice*, reproduced in *Mallal's* Supreme Court Practice at page 723:

"Where a statute provides for an application to the court without specifying the form and the rules do not expressly provide for any special precedure, such application may usually be made by Originating Motion."

An examination of the National Land Code clearly shows that the Code does not provide for such an application. An appeal lies, under section 418, from any decision under the Code of the State Commissioner, Registrar or Collector, but as I have observed earlier on, there had been no decision from which an appeal could lie. There was only the exercise of the authority given to the State Commissioner and his successor in office under certain subsidiary legislations. There is a general authority in section 417 to make orders directing the Registrar or Collector to give effect to any judgment or order given or made in any proceedings relating to land. In my view and with respect, the omission of the State Commissioner in this section is significant and must mean that this general authority is in connection with the registration of the persons with an interest in the land: see *Che Dah bt. Haji Sulaiman and another* v. *The Commissioner of Land Titles, Penang*.[5] But there is nothing in the National Land Code which indicates that it has provided for such an application without specifying the form. And if I may so put it, it would indeed be odd if Government were to provide specifically for a challenge to its legislative powers or powers to pass subsidiary legislation.

All in all, it does appear to me that there is considerable substance in the contention of the learned Legal Adviser. On the other hand, however, there cannot be any serious embarrassment to the parties or their counsel in presenting their contentions or to the court in hearing the case and coming to a decision. No disputes of facts arise and the matter stands to be decided on a consideration whether there are powers to make the subsidiary legislations providing for an increased rental in the case of land hitherto held under a statutory land grant. For myself, if in a summons for directions, any application was made in an action commenced by writ for similar reliefs for an order to try the action as on a motion, I would not have expected objection from the respondent and I would not myself have hesitated to make the order.

The second objection by the Legal Adviser Penang that it is not comptent to the court to grant an injunction against the respondent is founded on section 29(2) of the Government Proceedings Act 1956. This subsection reads as follows:

29(2). The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

He also cited the case of *Law Kiat Long & Ors.* v. *The Pardons Board Johore & Ors.*[6]

The answer of the respondent was to the effect that what was asked for was an injunction not against the Government but against the State Commissioner. It was also said that this was a *quia timet* action.

With respect, I follow the judgment of Ali J. (as he then was) in *Law Kiat Long's* case and hold for the same reasons that this court has no jurisdiction to entertain the application for an injunction against an officer of the Government. In my view, if section 29(2) supra is read in conjunction with section 29(1)(a), which provides that

(a) Where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance but may in lieu thereof make an order declaratory of the rights of the party,

it will be readily seen that while it is within the competency of the court to make a declaratory order in lieu, it has not the right to grant an injunction against the Government or any order against any Government officer which would have the effect of being an injunction against the Government.

The third objection which is to the designation of the respondent is said by the respondent to have been over-ruled by H. S. Ong J. (as he then was) in Originating Motion No. 9 of 1970, a similar application also against the State Commissioner, when he made the order stating a case for the decision of the Federal Court. The case was stated in Federal Court Special Case No. 1 of 1973. (*Philip Hoalim Jr. & Anor.* v. *State Commissioner, Penang*[7]).

I am however unable to find that this point though raised in the Originating Motion was considered by my learned brother. It was not taken in the Federal Court and I therefore consider myself, with respect, free from authority.

Section 16(2) of the National Land Code provides for any action, suit or other proceeding relating to land in which it is sought to establish any liability on the part of the State Authority to be brought against the State Commissioner in the name of his office.

However, State Commissioner was only an abbreviation of the full title of Commissioner of Lands and Mines for the state; see section 5 of the National Land Code. The proper designation is therefore the Commissioner of Lands and Mines, Penang. But that is not the only difficulty. Even before the filing of the motion, an amendment in P.U.(B) 324 of 1970 was passed whereby this officer was re-styled Director of Land and Mines, Penang.

The learned Legal Adviser took a further point, in his submission that this officer was not a responsible party. However this did not come within the grounds specified by him in his application and for this reason I do not think I will rule on it.

I therefore agree that the respondent has been wrongly designated but since the error is a matter of appellation, it does not, with respect, appear to be of any great materiality. The notes in *Mallal's* Supreme Court Practice under "misnomer" read as follows:

"In the case of the mere misnomer of a plaintiff on a writ, the defendant by a summons supported by an affidavit, can compel the plaintiff to amend. If the defendant does not exercise this power, and the matter proceeds to trial, the misnomer can then be amended and in no circumstances can it affect the substantive judgment which the court is called on to pronounce."

I take it that the same applies to a misnomer of the defendant. Insofar as this mistake is concerned, I propose to leave it to the parties to take the appropriate action.

For the reasons given above, the only order I would effectively make on the application by the learned Legal Adviser Penang is to strike out prayer 3 for an injunction.

Costs should, I think, be costs in the cause.

Order accordingly.

Solicitors: *Lim Kean Siew & Co.*

NG BEE v. CHAIRMAN, TOWN COUNCIL, KUALA PILAH

[O.C.J. (Ajaib Singh J.) November 8, 1974]
[Seremban — Originating Motion No. 29 of 1974]

Administrative Law — Application requiring specific act to be done — Application in nature of mandamus — Right to performance of public duty — Respondent under no public duty to do act requested — Remedy applied for not complete — Alternative remedy — Town Boards Enactment (F.M.S. Cap. 137), s. 76 — Specific Relief Act, 1950, ss. 44(1) and 45.

The applicant applied for an order that the respondent do apply to the magistrate for an order for the demolition of premises in Kuala Pilah belonging to her. The respondent had made an order under section 76(1)(a) of the Town Broads Enactment prohibiting any person from entering or remaining in the said building on the ground that it was in a ruinous and dangerous condition likely to fall.

Held: (1) before the court may consider exercising its discretion in favour of granting the order under section 44(1) of the Specific Relief Act it must be satisfied that the applicant has a right to the performance of a duty under any law by a person holding a public office. The court must also be satisfied that all the conditions laid down in the proviso to section 44(1) of the Specific Relief Act are fulfilled;

(2) in this case the applicant had failed to show that she has the right to the performance of a public duty by the respondent;

(3) the respondent in this case was under no duty to make any application to the magistrate. Section 76(iii)(b) of the Town Boards Enactment empowered the respondent to make an application to the magistrate for a demolition order but the subsection did not impose any duty on him to do so;

(4) the order sought for was inadequate by itself to provide the applicant with a complete remedy, as it would have been left entirely to the discretion of the magistrate whether or not he would have ordered the demolition of the premises;

(5) on all these grounds, the application should be dismissed.

ORIGINATING MOTION.

Gurdial Bakan Singh for the applicant.

Suleiman Hashim (Legal Adviser, Negri Sembilan) for the respondent.

Ajaib Singh J.: This was an application by notice of motion for an order that the respondent, who is the Chairman of the Town Council, Kuala Pilah, do forthwith apply to the magistrate under section 76(iii)(b) of the Town Boards Enactment Cap. 137, for an order of demolition of premises No. 200 Jalan Tung Yen, Kuala Pilah. Section 76 of the Enactment reads as follows:—

"76. (i) If in the opinion of the Chairman any building or anything affixed thereto is in a ruinous state, likely to fall or in any way dangerous to the inhabitants or occupiers of such